

No. 75-1796

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

**MARY JANE R. JAMES, ADMINISTRATRIX
OF THE ESTATE OF HOWARD JAMES, PETITIONER**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

**ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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Petitioner, the administratrix of the estate of a deceased United States Navy serviceman, instituted this action under the Federal Tort Claims Act seeking damages resulting from the serviceman's death. The death was caused by injuries inflicted by United States Navy security guards following decedent's arrest for disorderly conduct at the naval base in Quonset Point, Rhode Island, where he was stationed (Pet. App. A11). The district court dismissed the suit on the authority of *Feres v. United States*, 340 U.S. 135 (Pet. App. A11-A23).

On petitioner's first appeal, the court of appeals remanded the case to the district court "for the limited purpose" of permitting petitioner to amend her complaint to allege a constitutional tort (see *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388) and for the taking of any

evidence germane to the allegations of the amended complaint (Pet. App. A9-A10).¹ On remand, the district court concluded that no cause of action based on the theory of a constitutional tort could be maintained against the United States without its consent and that there had been no waiver of sovereign immunity to permit such a suit (Pet. App. A3-A8). The court of appeals, considering both causes of action, affirmed (Pet. App. A1-A2).

1. Petitioner's claim under the Federal Tort Claims Act, as the courts below recognized (Pet. App. A1, A18), is barred by *Feres*. In *Feres*, this Court held that Congress did not give consent for the United States to be sued under the Federal Tort Claims Act for the death or injury of members of the armed services sustained incident to their service, stating (340 U.S. at 146):

[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

Petitioner seeks to avoid *Feres* by arguing (Pet. 6-8) that later cases have narrowed the scope of *Feres*.

¹The district court had denied petitioner's post-trial motion to amend (Pet. App. A9).

making it applicable only to injuries "aris[ing] out of or in the course of military duty." *United States v. Brown*, 348 U.S. 110, 113; see *Hale v. United States*, 416 F. 2d 355, 358-359 (C.A. 6). Whatever may be the distinction between such injuries and "injuries [that] arise out of or are in the course of activity incident to service," if indeed any such distinction exists, it is of little avail to petitioner here. Her claim is based upon the death of a serviceman that occurred while he was on active duty on the military base at which he was stationed, and as the direct result of the actions of military security officers who had placed him under military arrest and who were exercising military discipline and control over him (Pet. App. A1, A11, A18). Thus the suit would be barred under either standard.

Alternatively, petitioner suggests (Pet. 5-6) that *Feres* should be reexamined. But the principles announced in *Feres* have been recognized law for more than 25 years. Congress is free to waive sovereign immunity as it desires, but it has made no effort legislatively to overrule the *Feres* decision. It would be inappropriate for this Court, having said that Congress did not intend to create a cause of action against the United States in these cases by passage of the Federal Tort Claims Act, now to find such an intention despite 25 years of subsequent congressional acquiescence. If harsh results are thought to occur from this doctrine, the remedy lies with Congress and not this Court.²

2. Petitioner's cause of action against the United States alleging violations of the serviceman's constitutional rights (Pet. 8-13) stands on no better footing.

²The Court in *Feres* expressly noted that "if we misinterpret the Act, at least Congress possesses a ready remedy" (340 U.S. at 138).

With regard to the necessity of a waiver of sovereign immunity before a suit may be entertained, there is no distinction between common law or statutory causes of action and constitutional causes of action. *Duarte v. United States*, 532 F. 2d 850, 851-852 (C.A. 2). Cf. *United States v. Testan*, 424 U.S. 392, 401-402. Under *Feres*, sovereign immunity has not been waived, regardless of whether the tort alleged is defined by common law, statute, or the Constitution.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.